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No. 96-1824

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

LEE et al., *Petitioners*,

v.

HARCLEROAD et al., *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI ON BEHALF OF AMERICAN DISABLED FOR ATTENDANT PROGRAMS TODAY, NOT DEAD YET, WORLD INSTITUTE ON DISABILITY, THE ARC, TASH, NATIONAL SPINAL CORD INJURY ASSOCIATION, INC., AMERICAN FOUNDATION FOR SUICIDE PREVENTION, COMMISSION ON AGING WITH DIGNITY, MICHIGAN HANDICAPPERS CAUCUS & NATIONAL LEGAL CENTER FOR THE MEDICALLY DEPENDENT & DISABLED, INC.

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No counsel for a party authored the brief in whole or in part. The Alliance Defense Fund (Scottsdale, AZ) provided funds to prepare the brief.

INTERESTS OF THE AMICI CURIAE

This case concerns the status of persons with disabilities under Article III of the U.S. Constitution. In particular, it raises the question of whether members of a class segregated according to their disability-related life expectancy may challenge state laws in federal court that encourage only them to request suicide assistance from physicians.

This case will impact the entire disabilities community. Even where proposals to legalize assisted suicide such as Oregon's Ballot Measure 16 ostensibly limit their scope to the "terminally ill", they implicate the interests of a much broader class because "persons suffering from terminal illnesses and those experiencing severe pain almost always meet the definition of individuals with disabilities, and . . . run the risk of being subject to life-shortening measures even when they may not in fact have life-threatening conditions . . . ." National Council on Disability, *Assisted Suicide: A Disability Perspective — Position Paper* (hereinafter "*Position Paper*") at 9 (Mar. 24, 1997).[1]

Most of these proposals define "terminal" so broadly as to sweep within their reach an expansive range of chronic conditions that will result in death in a fixed period of time if basic care is not provided. *See infra* Argument at 16-17. Even if a State enacts a law that defines "terminal" as narrowly as possible, precedents in cases involving treatment refusals will force the courts to expand the eligibility criteria to encompass a much broader range of conditions on equal protection grounds. *See Bouvia v. Superior Court*, 225 Cal. Rptr. 297, 302

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[1]The National Council on Disability has decided "that at this time in the history of the American society it opposes the legalization of assisted suicide." *Position Paper* at 50. Established by Congress under The Rehabilitation Act of 1984 (Pub. L. 98-221) as an independent federal agency, the Council serves as "the principal agency within the federal government charged with the responsibility of providing cross-disability policy analysis and recommendations regarding government programs and policies that affect people with disabilities". *Id.* at Executive Summary.

(Cal. App. 1986) (finding "no practical reason to limit the exercise of this [treatment refusal] right to 'terminal' patients" in case involving person with cerebral palsy); *McKay v. Bergstedt*, 801 P.2d 617 (Nev. 1990) (issuing similar holding in case involving person with injury-related quadriplegia); *State v. McAfee*, 385 S.E.2d 651 (Ga. 1989) (same).

Moreover, laws legalizing assisted suicide will ultimately target the larger class of persons with physical and mental disabilities. For example, Hemlock U.S.A. — the main proponent of legislative change — currently favors limits restricting physician-assisted suicide to the terminally ill, but eighty-two percent of its membership agrees "that Right-to-Die legislation should be written to include the hopelessly ill in addition to the terminally ill." Jeffrey J. Kamakhi & Elaine Fox, Who's Fighting to Die?: A Look at the Hemlock Society Membership 8 (unpublished/undated manuscript included in Hemlock's student information packet, discussing recent survey of 6,398 Hemlock members). Hemlock founder Derek Humphry has recommended that "those of us who sympathize with a justified suicide by a handicapped person" should pursue an incremental approach, because with the enactment of statutes permitting assisted suicide for the terminally ill "will come a more tolerant attitude [toward authorizing suicide assistance for] the other exceptional cases." Derek Humphry, *Final Exit* 62 (1991).

A committee including the chairperson of the Greater Boston Hemlock Society (Nancy Dorfman) recently proposed a comprehensive model statute authorizing physician-assisted suicide for persons with an "intractable and unbearable illness". A Model State Act to Authorize and Regulate Physician-Assisted Suicide, Section 2(d), *in* Charles H. Baron et al., *A Model State Act to Authorize and Regulate Physician-Assisted Suicide*, 33 Harv. J. Legis. 1, 25 (1996). The model act defines such a condition as "a bodily disorder (1) that cannot be cured or successfully palliated, and (2) that causes such severe suffering that a patient prefers death", and conspicuously omits any limitation based on life expectancy. *Id.*

The authors of the model statute emphasize that this category would include persons with "AIDS, advanced emphysema, some forms of cancer, amyotrophic lateral sclerosis, multiple sclerosis, and many other debilitating conditions", even though they "are not likely to die from their illnesses within six months." Baron et al., 33 Harv. J. Legis. at 11. The authors considered expanding the eligible class even further, but "[co-author] Professor Dan Brock conceded that politics played a significant role in his group's decision not to sanction physician assisted suicide for the chronically mentally ill." John Arras, *News From the Circuit Courts: How Not to Think About Physician-Assisted Suicide*, BioLaw, July-Aug. 1996, at S:171, S:188 n.30.

Legislators have introduced bills based on the model act in Illinois and Massachusetts. Dignity in Dying Act, H.B. 691, 90th Leg., 1st Sess. (Ill. 1997); An Act to Regulate Physician Aid in Dying, H.B. 1543, 180th Leg., 1st Sess. (Mass. 1997). At the present time, these bills refer only to terminally ill persons expected to die within six months, but they can and likely will be amended later to incorporate the model act's more expansive language, and even to apply to persons with chronic mental disabilities. Thus, advocates for assisted suicide are laying the groundwork for enacting assisted suicide laws which stigmatize as better off dead a broadly defined class of persons with disabilities.

Consequently, denying standing to persons with terminal disabilities in this case will serve as precedent for denying standing to the much larger class of persons with disabilities certain to be affected by laws more expansively-drawn than Measure 16. It will also serve as precedent for denying persons with disabilities federal standing to challenge stigmatizing laws generally. The results will be devastating.

Persons with disabilities are protected as a class by, *inter alia*, the Equal Protection Clause of the U.S. Constitution and the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12182 (hereinafter "ADA"). For example, this Court has observed that "[t]he State may not, of course, selectively deny its protec-

tive services to certain disfavored minorities without violating the Equal Protection Clause." *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 197 n.3 (1989). In particular, disability-based discrimination violates the Equal Protection Clause when motivated by "irrational prejudice", even when "the electorate as a whole, whether by referendum or otherwise" approves it. *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 448, 450 (1984). Moreover, Congress enacted the ADA to strengthen federal protection against disability-based discrimination after finding that persons with disabilities are a discrete and insular minority historically subject to invidious animus. Congress also found that disability-based discrimination persists in such critical areas as "health services . . . and access to public services." 42 U.S.C. § 12101(a)(2).

Persons with disabilities should have every reason to expect the federal courts to hear their complaints, especially those alleging stigmatic injury and brought pursuant to the federal guarantees just described. However, the Ninth Circuit's decision to dismiss this case casts in doubt such assurances; if the decision stands, then it will dramatically limit the ability of all persons with disabilities to vindicate their federal rights, not only in the assisted suicide context, but in all other contexts as well.

Thus, the following Amici have a direct interest in this appeal:

American Disabled for Attendant Programs Today (hereinafter "**ADAPT**") is a national organization and advocate for the rights and interests of persons with disabilities. The majority of its membership consists of persons who have severe disabilities and who have been institutionalized in nursing facilities and other public institutions solely because they have disabilities. ADAPT was a key participant in the political and legislative process that resulted in the passage in 1990 of the Americans with Disabilities Act. *See also ADAPT v. Skinner, U.S. Department of Transportation*, 867 F.2d 1471, 881 F.2d 1184 (3rd Cir. 1989).

Not Dead Yet is a national organization of people with severe disabilities who oppose the legalization of assisted suicide, because it singles out people with significant health impairments for lethal assistance. Not Dead Yet members believe that physician assisted suicide threatens the remaining rights of a profoundly oppressed and marginalized people by exposing this class to the enormous risks of abuse associated with assisted suicide, and by perpetuating invidious social attitudes which hold that death is to be preferred over disability.

World Institute on Disability (hereinafter "WID") is a research, policy, and training center founded in 1983 to work toward independence and equity of opportunity for all people with disabilities, their friends, and families. WID opposes the legalization of physician-assisted suicide given the existing health care climate, social environment, and society's attitudes toward disability. Moreover, the impact of assisted suicide on the rights and interests of persons with disabilities has not been authoritatively researched.

The Arc of the United States (hereinafter "The Arc"), a national organization on mental retardation, is an open membership organization made up of people with mental retardation and their families, friends, interested citizens, and professionals in the disability field. With 140,000 members in 1,100 state and local chapters nationwide, The Arc is the largest voluntary organization devoted solely to working on behalf of the estimated seven million people with mental retardation in the United States and their families. While The Arc does not have a position on physician assisted suicide, The Arc strongly supports the broadest interpretation of standing to allow people with disabilities, including mental retardation, to challenge legislation which has the effect of discriminating or stigmatizing.

TASH is an international organization which champions the unrestricted inclusion of all people, especially those with developmental and/or intellectual disabilities, in all areas of society. TASH has 40 regional chapters and more than 8,000 members in the United States and abroad. TASH affirms that

quality of life, respect and dignity are basic human values that apply to all people, and should not be denied on the basis of stigmatizing discrimination.

National Spinal Cord Injury Association, Inc. (hereinafter "NSCIA") is the largest civilian organization in the United States dedicated to improving the quality of life of persons disabled by spinal cord injury. Its members are among the more than 250,000 Americans paralyzed as a result of injury and disease to the spinal cord. Thus, NSCIA has a unique, real world perspective on some of the core misconceptions about severe disability that have spawned such proposals as Measure 16.

American Foundation for Suicide Prevention is a nonprofit organization dedicated to the prevention and study of suicide. The Foundation was created in 1987 (under its former name of the American Suicide Foundation) by mental health professionals, business and community leaders, and people who had lost loved ones to suicide. The Foundation believes that the legalization of physician-assisted suicide would foster otherwise preventable suicides without improving the care for persons with serious disabilities.

Commission on Aging with Dignity is a Florida-based organization and advocate for older persons. It is committed to promoting positive alternatives to assisted suicide — a "third path" between the dilemmas of "pain or poison" that many older persons fear they will face in the final stages of life. The Commission brings together on a regular basis representatives of government, business, and religion who agree on the need for constructive changes in the current approaches to care provided and made available to older persons.

Michigan Handicappers Caucus (hereinafter "**Caucus**") advocates on behalf of persons with physical and/or cognitive disabilities who reside in Michigan. The majority of its members have permanent disabilities and are indigent; many of the persons it serves are institutionalized and subject to legal guardianship. The Caucus is concerned about the negative

impact that the class-based legalization of assisted suicide will have on persons with disabilities.

National Legal Center for the Medically Dependent and Disabled, Inc., is a non-profit, public interest law firm. The National Legal Center provides legal assistance to persons seeking to obtain or maintain essential medical care and treatment, or who are threatened by stigmatizing policies regarding assisted suicide or euthanasia.

The parties have consented to the filing of this brief. Pursuant to the Rules of this Court, letters of consent from the parties have been filed with the Clerk of the Court.

SUMMARY OF THE ARGUMENT

The Petition for a Writ of Certiorari (hereinafter "Petition") raises an unprecedented question: who has federal standing to challenge assisted suicide laws that are so seriously defective as to implicate numerous federally-protected rights and interests of persons with disabilities? The Petition arises from a challenge against Oregon's Measure 16 brought by, and on behalf of, persons with terminal disabilities (hereinafter "Petitioners").[2] The Petitioners assert that they have standing to challenge Measure 16 because it will inflict stigmatic injury on them if it goes into effect.

The U.S. Court of Appeals for the the Ninth Circuit dismissed the Petition after ruling that the Petitioners lacked Article III standing despite their claim of stigmatic injury. However, this Court and federal appellate courts in other Circuits have determined that stigmatic injury provides sufficient basis for a federal claim cognizable under Article III. The Ninth Circuit's denial of standing suggests either that the Ninth

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[2]Your Amici will not address the issues raised by other parties, such as the physicians and health care facilities suing on their own behalf, and thus any reference to "Petitioners" will include only persons with terminal conditions.

Circuit rejects all stigmatic injury claims as noncognizable, or that it recognizes such claims except when they arise from discrimination based on disability. In either case, the ruling below places the Ninth Circuit in conflict with rulings of this Court and other Circuits.

Moreover, the Ninth Circuit's ruling raises two questions of great public importance. First, should the federal courts employ a double standard under Article III that gives standing, for example, to persons stigmatized by racial or gender-based discrimination, but denies standing to persons stigmatized by disability-based discrimination? Second, should persons with disabilities be precluded as a class from challenging laws that permit assisted suicide, no matter how seriously such laws will injure them?

Supreme Court review is necessary given the nature of the questions at stake, the need to resolve the conflict between the Ninth Circuit decision and other federal precedents, and the case's national importance. The outcome is of enormous significance to persons with disabilities who may suffer stigmatic injuries in any number of circumstances. In the context at hand, this Court's guidance is especially crucial, because it will resolve who has standing to challenge a law that encourages a discrete class, and that class only, to commit assisted suicide. Therefore, the Court should grant the Petition by issuing a writ of certiorari to the Ninth Circuit.

ARGUMENT

I. The Ninth Circuit Ruling Conflicts With The Decisions Of The Supreme Court And Other Federal Courts Of Appeal That Recognize Stigmatic Injury Resulting From Discrimination As A Basis For Article III Standing.

The federal courts have recognized "stigmatic injury" claims, sufficient to confer Article III standing, when a complaint alleges that the aggrieved party is "personally subject to discriminatory treatment" that interferes with a "concrete

interest" (*Allen v. Wright*, 468 U.S. 737, 757 n.22 (1984)), and that such discrimination "perpetuat[es] 'archaic and stereotypic notions' or "stigmatiz[es] members of the disfavored group as 'innately inferior' and therefore as less worthy participants in the political community". *Heckler v. Mathews*, 465 U.S. 728, 739 (1984).

In their Complaint, Petitioners have alleged that: 1) "Measure 16 creates a class of terminally ill persons whom it strips of . . . benefits afforded others [by laws barring assisted suicide, providing for suicide prevention and intervention, and protecting against medical malpactice] " (Third Amended Complaint for Declaratory and Injunctive Relief at 31); 2) "the inadequate safeguards of Ballot Measure 16 increase the vulnerability of [such] persons . . . to request assisted suicide despite their true intent" (*id.* at 8); and 3) ". . . Ballot Measure 16 rests on a judgment that the lives of patients who have the disability of a terminal disease are less deserving of protection than others". *Id.*

Thus, Petitioners adequately alleged stigmatic injuries by asserting that Measure 16 will discriminate against the named patients and the class they represent, as well as the similarly-situated patients of the named physicians and facilities, solely because they have disabilities regarded as terminal. Such discrimination will interfere with their concrete interest in the benefits of being protected by Oregon's ban on assisted suicide, medical malpractice laws, and other suicide prevention or intervention policies, and will stigmatize them as less worthy than others by denying them the same criminal and civil protections against suicide provided to all other Oregonians.

Nevertheless, the Ninth Circuit dismissed the Complaint on standing grounds, and it denied a rehearing petition which asserted that the court had overlooked the Petitioners' stigmatic injury claims. *See* Petition for Rehearing, *reprinted in* Appendix to Petition for a Writ of Certiorari at 78a-80a.

The Ninth Circuit's denial of standing conflicts with the decisions of the Supreme Court and other federal Circuits that

recognize stigmatic injury as a basis for Article III standing to raise civil rights claims. *See* Petition for a Writ of Certiorari at 23-26 and cases cited therein. These cases demonstrate that individuals subject to state policies which invidiously discriminate on the basis of an irrelevant trait, and which stigmatize them as less worthy candidates for a state benefit, suffer a federally cognizable injury.

The denial of standing below indicates either that the Ninth Circuit rejects all stigmatic injury claims regardless of the classification at stake, or that it rejects such claims only when they arise from disability-based discrimination. In other words, by denying standing to Petitioners, the Ninth Circuit may be refusing to acknowledge *any* form of stigmatic injury, thereby rejecting claims brought by *all* persons within the Circuit who suffer such injury; or it may be refusing to acknowledge stigmatic injury claims *only* in cases involving disability-based discrimination.

Therefore, your Amici respectfully request that this Court issue a writ of certiorari to address the conflict caused by the Ninth Circuit's anomalous decision.

II. The Ninth Circuit's Denial Of Standing Raises Significant Questions Of Federal Law That Should Be Addressed By This Court.

The Ninth Circuit's ruling raises at least two issues of great public importance, especially to persons with disabilities, that this Court should address. First, should stigmatic injury claims arising from discrimination based on disability be treated any differently under Article III than stigmatic injury claims arising from discrimination based on race, gender, or other irrelevant characteristics? Second, should persons with disabilities be denied as a matter of course any realistic opportunity to challenge assisted suicide laws such as Measure 16 in the federal courts?

A. *The Ninth Circuit's Ruling Should Be Reviewed Because It Suggests That For Article III Purposes Stigmatic Injury Caused By Disability-Based Discrimination Is Distinguishable From Stigmatic Injury Caused By Racial Or Gender-Based Discrimination.*

If Oregon authorized physicians to provide lethal overdoses only to African- or Asian-Americans or to women — and yet continued to prohibit physicians and every one else from assisting in the suicides of all others — then the stigmatic injury would be undeniably apparent. Federal courts would have no trouble finding that such a policy would perpetuate invidious prejudice and stigmatize racial minorities or women as less deserving of the law's protection against suicide and suicide assistance.

Like all other suspect or quasi-suspect classes, persons with disabilities have historically been subject to "widespread and virulent discrimination" (National Council on Disability, *Position Paper* at 18), and continue to be confronted by "deep-seated" animus. *Id.* at 19. Congress has specifically found that "individuals with disabilities are a discrete and insular minority who have been . . . relegated to a position of political powerlessness in our society . . . based on stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society." ADA, 42 U.S.C. § 12101(a)(7).[3] Thus, their Article III standing to complain of stigmatic injury should not turn on the erroneous assumption that disability-based classifications are any less suspect than those based on race or gender.[4]

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[3]*See also Lake v. Arnold*, No. 96-3412, slip op. at 6-11 (3rd Cir. May 2, 1997) (holding that congressional findings in the ADA's preamble establish that persons with disabilities are a suspect class for purposes of bringing a claim under 42 U.S.C § 1985(3)).

[4]In fact, inequality in legal protection may inflict "immediate, continuing, and real injuries that outrun and belie any legitimate justifications", regardless of whether the classification at stake is

Dr. Carol J. Gill, a clinical psychologist and a nationally recognized expert on the relationship between disability and suicide, testified below to Measure 16's injurious impact:

> [O]ur society increasingly views the support of incurably ill and disabled people as burdensome. This conveys a relentless experience of stigma that can more powerfully erode a person's will to live than can any physical illness. . . . The Oregon Death With Dignity Act will exacerbate this unconscionable trend by . . . setting up a mechanism to distinguish citizens whose death wishes will be overruled from citizens whose death wishes will be validated. It uses health distinctions to determine those who must be protected from despair versus those who can be escorted to its depths.
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> * * * *
>
> In fact, the very existence of the Act itself is an ominous social validation of suicide for persons with incurable conditions. That public support of the Act comes from a state that has also supported withholding healthcare for certain chronic conditions may be interpreted by many as a message that incurably ill Oregonians are an unwanted hardship for their fellow citizens.
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> In light of the disturbing facts presented above, I submit that the Oregon Death With Dignity Act singles out a class of persons that society is already too quick to discard and further reduces support for and protections of their lives. The

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suspect or not. *Romer v. Evans*, __ U.S. __, 116 S. Ct. 1620, 1629 (1996).

> underlying message is that the life of a person who is incurably ill and predicted to die within six months is not as worthy of support as a physically robust life. That bias is an insidious form of prejudice that disability rights activists call "ableism" or "physicalism." A society that weighs the value of a citizen's life according to health or physical attributes is entering risky territory. When physicians are instructed to adopt such a scale with impunity, the silent and far-reaching effects on health care and on society as a whole will be as impossible to predict as to control. One of the most certain and tragic outcomes, however, is that it will lead to the wrongful premature deaths of persons who, if given basic support and reasonable options instead of a socially and medically sanctioned exit, would prefer to live. It is my professional opinion that the Oregon Death With Dignity Act is dangerously flawed and places at risk thousands of persons with life-threatening disabilities. Further, it removes the safeguards that are in place for all other citizens and thus constitutes a form of codified discrimination against persons with life-threatening disabilities.

Affidavit of Carol J. Gill, Ph.D. at 3-4, 9, 11-12.

As Dr. Gill's testimony makes clear, the stigmatic injuries inflicted by Measure 16 on the Petitioners in this case and similarly-situated Oregonians are just as harmful as any stigma caused by discrimination based on race or gender. The offense is especially grievous because the stigmatizing discrimination encourages members of the affected class to kill themselves.

The National Council on Disability observed that "[f]or many people with disabilities, society has frequently made it clear that it believes they would be better off dead." National Council on Disability, *Position Paper* at 49. Because such attitudes are pervasive, the "quality of life [of people with

disabilities] and [their] worth as human beings have long been egregiously undervalued by society." *Id.* at 11. The Council concluded that laws legalizing assisted suicide would threaten the rights and interests of persons with disabilities precisely because of their stigmatizing effect and their likely role in increasing the risk of mistake and abuse. *Id.* at 49-50.

According to the Council:

> At its core, legalization of physician-assisted suicide would represent a recognition by society that some particular individuals have gotten all the substantial positive benefits they are going to get from their lives, and, in the face of serious pain and suffering they would endure if they continue to live, the few more hours or days they can wring out of existence are not worth it; for such individuals society would be saying that death is preferable to life, and physicians would be empowered to help them terminate their lives. For many people with disabilities, society has frequently made it clear that it believes they would be better off dead, . . . But it is more often the discrimination, prejudice, and barriers that they encounter, and the restrictions and lack of options that this society has imposed, rather than their disabilities or their physical pain, that cause people with disabilities' lives to be unsatisfactory and painful.

Id. at 49.[5]

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[5]In Australia, "a disturbing equation [was regularly] drawn between having 'dignity' and being 'without disability'" in that country's recent debate on assisted suicide. Most public comments submitted to the Parliament that favored assisted suicide associated "undignified" dying with incontinence and immobility. As a result, "the attitude from certain quarters that dying with dignity demands that life ends before such circumstances begin carries a message which only serves to devalue those who live in such circumstances." Senator

Given the similarities between the injuries inflicted by racial, gender-based, or disability-based discrimination, the Ninth Circuit's ruling requires this Court to consider whether the nature of the trait upon which a stigmatizing classification is based should have any bearing on the cognizability of a particular stigmatic injury claim. More specifically, the Ninth Circuit's ruling raises the question: Does it make any legal difference under Article III that Measure 16 discriminates on the basis of disability, rather than, for example, on the basis or race or gender?

Moreover, whether persons with physical and mental disabilities have standing to challenge policies that cause stigmatic injury by incorporating disability-based discrimination is an issue that will arise in a wide variety of circumstances outside the assisted suicide context — including cases alleging discrimination in housing (such as the denial of independent living options), employment, education, and health care services. These cases will involve a host of government programs and benefits, and they will be brought by persons with every form of physical and mental disability. If persons with disabilities cannot complain when they are stigmatized by a law that authorizes doctors to help only them to commit suicide because of their disability, then it is impossible to see how they might bring suit in any of these other circumstances.

Your Amici thus urge this Court to grant the Petition in order to clarify the scope of Article III standing with respect to stigmatic injury claims raised by persons with disabilities.

Eric Abetz et al., *Advice to the Senate* at 11-12, *appended to* Senate Legal and Constitutional Legislation Committee, Australian Parliament, *Euthanasia Laws Bill 1996* (Mar. 1997). A majority of the committee's members drafted *Advice to the Senate* to supplement the official committee report.

B. *The Ninth Circuit Ruling Denies Persons With Disabilities Their Day In Federal Court To Redress A Multitude Of Federal Grievances Against Laws Such As Measure 16.*

While Measure 16 may be the first statute of its kind to be enacted, it will not likely be the last. In 1996, several nearly-identical proposals to legalize assisted suicide were filed in Alaska, Arizona, California, Colorado, Maryland, Massachusetts, Michigan, New Hampshire, New York, South Carolina, Vermont, and Wisconsin. June 1996 Legislation Update at 3-4, *in* Choice in Dying, *Right to Die Law Digest: A Quarterly Review of Legislative Activity and Case Law*. Similar bills have been filed or refiled this year in at least ten states, including Connecticut, Hawaii, Illinois, Maine, Massachusetts, Michigan, Nebraska, Vermont, Washington, and Wisconsin.[6]

These proposals, if adopted, would apply to a broadly defined class of persons with disabilities, and would establish a regime of legalized assisted suicide so irrational and defective as to implicate a broad range of federal violations directly concerning the affected class. This appeal thus raises an additional question of great public importance: Should an entire class of persons with disabilities be effectively denied all opportunity to challenge such proposals in federal court, insofar as they are required to be at the brink of unwanted suicide

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[6]**Connecticut:** H.B. 6083, 1997-98 Leg., 1st Sess. (Conn. 1997); **Hawaii:** H.B.2204, 1997-98 Leg., 1st Sess. (Haw. 1997); **Illinois:** Dignity in Dying Act, H.B. 691, 90th Leg., 1st Sess. (Ill. 1997); **Maine:** An Act to Allow Physician-Assisted Deaths for the Terminally Ill, H.P. 663, 118th Leg., 1st Sess. (Me. 1997); **Massachusetts:** An Act to Regulate Physician Aid in Dying, H.B. 1543, 180th Leg., 1st Sess. (Mass. 1997); **Michigan:** S.B. 81, 89th Leg., 1st Sess. (Mich. 1997); **Nebraska:** Physician Aid-In-Dying Act, L.B. 406, 95th Leg., 1st Sess. (Neb. 1997); **Vermont:** An Act Relating to Rights of Terminally Ill Patients, H. 109, 64th Leg., 1st Sess. (Vt. 1997); **Washington:** S.B. 5654, 55th Leg., 1st Sess. (Wash. 1997); **Wisconsin:** Death with Dignity Act, A.B. 32, 93rd Leg., 1st Sess. (Wis. 1997).

before such challenges could be brought?

Ostensibly, the proposals to legalize assisted suicide apply only to persons with "terminal conditions". Like Measure 16, however, most of them define what constitutes such a condition in the broadest of terms. Measure 16 applies to persons with "an incurable and irreversible disease that has been medically confirmed and will, within reasonable medical judgment, produce death within six (6) months." Section 1.01 (12). Similarly, the 1997 proposals may refer variously to "an affliction that is likely to result in the individual's death within six months" (Massachusetts), "an incurable or irreversible condition which will result . . . in . . . death within six months" (Maine & Nebraska), and "an incurable and irreversible disease that has been diagnosed by an individual's attending physician and medically confirmed and that will, within reasonable medical judgment, cause death within 6 months" (Wisconsin). One proposal expands the meaning of "terminal" even further by including conditions that will result in death "within one year" (Vermont).

These definitions would encompass many, if not most, forms of serious disabilities. For example, any person with an "incurable and irreversible" disability — such as paraplegia, quadriplegia, severe mental retardation or serious head injury — who requires medical attention or assisted living services to meet basic survival needs, and who will die without such support within the designated time, would be regarded as terminal. Thus, these proposals will directly affect the rights and interests of a considerable number of persons with disabilities.

Moreover, apart from their classificatory scheme, all of these proposals are facially vulnerable to challenge on other federal grounds because they institute grossly inadequate policies and safeguards against mistake and abuse. *See, e.g.*, Daniel Callahan & Margot White, *The Legalization of Physician-Assisted Suicide: Creating a Regulatory Potemkin Village*, 30 U. Richmond L. Rev. 1 (1996) (criticizing similar proposals introduced in twelve states in 1995). Given the irremediable

and lethal nature of the risks created thereby, those directly affected should not have to wait until the threats are realized before their federal grievances can be heard.[7]

Yet, by denying standing to the Petitioners in this case, the Ninth Circuit has signalled that the federal courts will not be accessible to complaints against such laws unless a person with disabilities is on the brink of unwanted suicide. Limiting standing to sue to such exigent circumstances will, as a practical matter, make any prophylactic federal relief extremely difficult if not impossible to obtain. Thus, in effect, the Ninth Circuit's ruling immunizes Measure 16-type laws from remedial federal challenge no matter how irrational they are in their conception and design, and no matter how serious and inevitable are the risks they create.

In sum, the Ninth Circuit's ruling is of obvious constitutional importance because it denies an entire class of persons with disabilities their day in federal court and insulates an entire class of seriously defective laws from effective federal scrutiny.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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[7]Even a law which contains every safeguard imaginable will fail to extinguish the stigma caused by singling out persons with disabilities as the only appropriate candidates for death, and such a law may still fail in its application to eliminate the risks of mistake and abuse. For example, in the Netherlands "[v]irtually every guideline [for assisted suicide] set up by the Dutch — a voluntary, well-considered, persistent request; intolerable suffering that cannot be relieved; consultation; and reporting of cases — has failed to protect patients or has been modified or violated." Herbert Hendin et al., *Physician-Assisted Suicide and Euthanasia in the Netherlands: Lessons From the Dutch*, 277 J.A.M.A. 1720, 1722 (1997).

Respectfully submitted,

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